upon he ordered the appellants to refund or return to the respondent part of the purchase money amounting to $6,794.20 which, as it appears to me, was the estimated value of the area of land short of the 9 acres. Strictly speaking, a refund is not compensation in the true sense of the word. It is a liability which the vendor undertakes to discharge upon the happening of the event and does not depend upon any breach of contract. No such undertaking can possibly be implied from the contract in this case. A liability to compensate, on the other hand, is one which necessarily arises upon a breach of contract. But no such breach was alleged or pleaded by the respondent. Upon this view of the case, the respondent's claim ought to have failed. But the learned trial judge granted him relief in the nature of compensation under section 18(3) of the Specific Relief (Malay States) Ordinance, 1950.

The controversy before us turns mainly on the effect of section 18 of the Specific Relief (Malay States) Ordinance. This section provides —

"(1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

(2) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

(3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) Compensation awarded under this section may be assessed in such manner as the court may direct."

Upon a plain reading of the first three subsections, there cannot possibly be any question that compensation can be asked for by a party to a contract and awarded by the court only in cases where specific performances are claimed. Subsection (1) speaks of the right of the party suing for specific performance to ask for compensation in addition to or in substitution for, specific performance. Subsection (2) deals with the power of the court to award compensation where it considers specific performance claimed ought not to be granted. Subsection (3) contemplates a situation in which both specific performance and compensation, respectively, ought to be granted and awarded because specific performance alone would not be a sufficient remedy. Indeed, sofar as it is clear that no specific performance is claimed in this case, there is no reason or ground for exercising statutory powers to award compensation. This appeal must be allowed.

In the respondent's written submission our attention was drawn to the words of the explanation to section 18 which reads —

"*Explanation* — The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section."

Relying on these words the respondent said —

"It is my submission that the facts of this appeal fit in nicely with this section. It does not matter whether the plaintiff has sued for specific performance or not."

He did not or could not elaborate plainly because he has no arguable case to advance. If I may say so, the object of the explanation is to remove any doubt as might arise with regard to the court's power or jurisdiction to award compensation in circumstances when it is *unable* to make an order of specific performance for reasons mentioned in the two illustrations to the explanation. These clearly speak of circumstances when contracts become *incapable of specific performance.* The first is when the patent sued for expires before the hearing of the suit for specific performance, and the second is when allottment of shares sued for could not possibly be made to the party claiming specific performance. In either case according to the explanation, the court has the power or jurisdiction to award compensation on the basis of non-performance. The explanation has nothing whatsoever to do with any of the subsections, which in terms are so clear and explicit that they do not require any further explanation or construction by this court.

Appeal allowed

Solicitors: *Skrine & Co.; T. C. Tang & Co.*

KOH SHEY GUAN v. LEE KOK CHAN

[F.C. (Azmi L.P., Gill and Ali F.JJ.) October 12, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 55 of 1970]

Land Laws — Contract — Sale of land — Time not essence of contract — No delay by party — Notice to complete — Reasonable time to be given — Deposit — Forfeiture of.

The appellant had entered into a contract to sell to the respondent three pieces of land. The respondent paid $15,000 as "advance towards the purchase price of the said lands." It was agreed that the sale was to be completed when the appellant produced the titles of the said pieces of land which he had applied from the authorities. Subsequently the appellant wrote to the respondent saying that he was in possession of the titles and giving the respondent 14 days to settle the balance of the purchase price and complete the sale. The respondent did not settle the purchase money within the period stipulated in the notice as he had written to the appellant to ask for one month's time to settle the difference. This letter was refused acceptance and was returned undelivered. Later the respondent wrote to the appellant to complete the sale. Getting no response he commenced an action to recover the deposit and damages. The appellant in his defence claimed that he was entitled to forfeit the deposit. The learned trial judge gave judgment for the respondent holding that the 14 days period given in the appellant's notice was insufficient and unreasonably short. On appeal,

Held, dismissing the appeal: (1) as there was no evidence to show that the respondent-purchaser had been guilty of an unnecessary delay, there was no reason for the appellant-vendor to limit the time within which the respondent-purchaser was to complete the purchase;

(2) even if the appellant-vendor had the right to give the notice making time the essence of the contract, the time given was in the circumstances insufficient and unreasonable;

(3) in the circumstances there was no breach of contract which would warrant the forfeiture of the deposit.

Cases referred to:-

(1) *Webb* v. *Hughes* (1870) L.R. 10 Eq. 281.

(2) *Crawford* v. *Toogood* (1879-80) 13 Ch. D. 153.

(3) *Taylor* v. *Brown* 2 Beav. 180.

FEDERAL COURT.

V. L. Kandan for the appellant.

Dato S. P. Seenivasagam for the respondent.

Cur. Adv. Vult.

Ali F.J.: By an agreement dated 4th March, 1964, the appellant/vendor agreed to sell and the respondent/purchaser agreed to buy three pieces of lands for the total sum of $38,500. The purchaser paid $15,000 as "advance towards the purchase price of the said lands" Clause 3 of the agreement provides:

"The purchaser agrees to pay the balance of $23,500.00 as and when the vendor produces the titles of the said pieces of land which he has applied from the authorities."

and clause 5 of the agreement further provides:

"Likewise the purchaser agrees that should he fail to pay the balance of $23,500.00 when the purchaser (vendor?) produces the titles of the said pieces of lands then the advance paid by the purchaser in clause (2) above shall be forfeited by the vendor."

It thus seems clear that at the time when the parties entered into the agreement, the titles to the land were not available to enable them to complete the transaction by formal transfers. In a letter dated 14th May, 1965, a little over a year later, the vendor wrote to the purchaser reminding him of his obligations under the agreement, particularly clause 3. The letter stated:

"... I am informing you that I am in possession of the said titles of the said three pieces of lands and that I am hereby giving you fourteen (14) days notice for you to settle the balance of $23,500 (dollars twenty three thousand five hundred only) failing which I am compelled to forfeit your advance of $15,000 *vide* paragraph (5) of the said agreement."

The purchaser did not settle the balance of the purchase money within the period stipulated in the notice. He said he did not do so as he had written to the vendor asking for one month's time to settle the balance but this letter was refused acceptance and returned undelivered. He also said he wrote again on 8th June, 1965 requiring the vendor to be at the Land Office, Kuantan to complete the formal transfer of the lands and this letter too was refused acceptance and returned undelivered. Finally on the 24th June, 1965, he wrote a third time asking the vendor to complete the sale within 14 days, otherwise legal proceedings would be instituted to recover the $15,000 paid and also damages for breach of contract. Getting no response from the vendor, the purchaser commenced action to recover the deposit and damages. The vendor resisted the claim stating in his defence that he was entitled to forfeit the advance payment.

In his judgment the learned trial judge said that although time was not of the essence of the contract originally entered into between the parties, it became the essence of the contract after the vendor's letter of the 14th May, 1965 fixing the time within which the contract was to be perfected. *Webb* v. *Hughes*[1] was cited as supporting that view. Nevertheless, the learned trial judge, following the decision in *Crawford* v. *Toogood*,[2] held that the 14 days period given in the vendor's notice was insufficient or unreasonably short On that ground judgment was entered for the purchaser.

The vendor has appealed on several grounds, one of which was that the trial court erred in holding that the 14 days period given in the notice was unreasonably short. In this connection, the appellant has referred to a passage from the judgment of the learned trial judge giving reasons for holding that the notice was insufficient or unreasonable. The passage reads:

"The document of title is not a very simple one. Probably requisitions on the title have to be made. There would be answers to the requisitions, and probably rejoinders to the answers. The draft of the transfer would have to be prepared and approved by the parties and/or their solicitors. There must be other miscellaneous matters to be considered. That again would take time."

The same reasons appear to have been given for the decision in *Crawford* v. *Toogood, supra.* Counsel for the appellant submitted that such reasons can hardly apply to the present case so far as the system of conveyancing in England is different from that prevailing in this country. I agree with counsel. Under our system, a transfer of land is effected by the signing and attesting of the memorandum of transfer followed by its registration in the appropriate land offices. Such a system would envisage both parties to be together, the vendor, signing the memorandum of transfer and the purchaser, paying the purchase money for the land. Clause 3 of the agreement contemplates the same thing. Although this clause speaks of the purchaser's undertaking to pay the balance, it also contemplates the production of the title deeds. What the vendor had done in this case was to inform the purchaser by letter that the title deeds were available. That was quite proper. But to limit the time within which the purchaser was to pay the balance of the purchase price was something quite different. There was nothing in the evidence to suggest that prior to the vendor's letter of 14th May, 1965 the purchaser had been guilty of any unnecessary delay. If there was such a delay, the vendor might well have a reason for wanting to limit the time within which the purchaser was to complete the purchase in order to avoid any further delay But even then the time limited must be reasonable. So was it stated in *Webb* v. *Hughes, supra,* by Sir R. Malins V.C. on page 287:

"*Taylor* v. *Brown*[3] is a case I often have occasion to refer to upon this subject. The rule was there laid down by Lord Langdale, that where the contract and the circumstances are such that time is not in this court considered to be of the essence of the contract — in such a case, if any unnecessary delay is created by one party, the other has a right to limit a reasonable time within which the contract shall be perfected by the other. It has been repeatedly so considered in this court."

The words I have underlined would require no further comment. Strictly in terms of the rule thus stated. this appeal must fail because there was absolutely no evidence that the purchaser/respondent was guilty of any unnecessary delay before the vendor decided to limit the time within which the contract was to be perfected.

The learned trial judge, however, dealt with the case on the basis that although the vendor, in the circumstances of this case, had the right to give the notice making time as of the essence of the contract, the time so given was insufficient or unreasonably short. In coming to that conclusion, the learned trial judge has partly adopted the reasons given in *Crawford* v. *Too-*

good, supra, which, as I have said earlier, were unsustainable in view of the difference in our system of conveyancing. Be that as it may, the learned trial judge seems firmly satisfied that the 14 days mentioned in the vendor's notice were unreasonably short He said this:

"I do not intend to specify what would be a reasonable time for the completion of all these steps but I certainly do not think that two weeks was reasonable. Indeed the plaintiff had asked for one month to complete the purchase as he thought that the period of two weeks within which to complete the purchase was not sufficient. I hold therefore that the notice was not valid and that the mere fact that the purchase was not completed on 28/5/1965 is not a bar to the plaintiff's right to relief. I will therefore allow the plaintiff's claim with costs."

His satisfaction seems to have been based upon a consideration of the evidence before him as a whole and, in particular, upon the evidence of the purchaser that he could not complete the purchase within 14 days. The test applied there was clearly that of a reasonable man. Even on the ground stated by the learned trial judge, this appeal will also fail.

Finally, I would add this. In terms of the agreement there cannot be any forfeiture of the deposit under clause 5 unless the purchaser has committed a breach of the contract. The uncontradicted evidence on record could only point to the fact that never at any time had the purchaser indicated, by words or deed, that he was unwilling to keep his part of the bargain. It might well be that he was unable to raise the balance of the purchase price within the period given in the vendor's notice. Twenty three thousand odd dollars is not such a sum of money which many people can raise within such a period. There was, therefore, nothing unusual, or unreasonable in the purchaser's request for an extension of time. All that he asked for was two weeks extension. But unfortunately this request did not come to the notice of the vendor. That, in my view, is immaterial. If the purchaser's evidence of his request for an extension of time could be accepted as true, and I can see no reason why it should not, it would clearly establish that he was at all times ready and willing to complete the purchase. There was, therefore, no breach of contract as might warrant a forfeiture under clause 5 of the agreement.

Upon any view of this matter, the appeal must fail.

Azmi L.P. and **Gill F.J.** concurred.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.; S. Seenivasagam & Sons.*

AIKBEE SAWMILL LTD. v. MUN KUM CHOW

[F.C. (Azmi L.P., Gill and Ali F.JJ.) October 12, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 60 of 1970]

Negligence — Injuries sustained in course of employment — Failure of employer to provide reasonably safe system of work — Failure to take reasonable steps to give adequate directions — Contributory negligence.

The plaintiff/respondent had claimed damages for personal injuries caused to him in the course of his employment with the appellants. The respondent and another workman were engaged in loading planks on a lorry of the defendants. The workers did not use cross-bars in loading the planks and had not been instructed to do so. Some of the planks which had been stacked on the lorry toppled over and struck the plaintiff. It was alleged that the accident was caused by the negligence of the appellants, their servants or agents and/or breach of the appellant's duty to provide a safe system of work. The learned trial judge held that there was evidence that the work was one where dangers were necessarily inherent in its operation and that therefore there was a duty on the part of the defendants/appellants to provide a reasonably safe system so as to protect the workmen from unnecessary risk and to give adequate instructions. He therefore gave judgment for the respondent. The defendants appealed and the only ground of appeal was that there was no finding of contributory negligence on the part of plaintiff/respondent. It was alleged that the respondent was aware of the purpose of using cross-bars in loading the planks and of the consequential danger of not using them and he was therefore negligent in not using them.

Held, dismissing the appeal: the evidence in this case showed that no instructions had been given to the workers that they must use cross-bars but rather that they were left to their own devices to load the planks. In the circumstances the respondent could not be said to be negligent in not using the cross-bars and therefore the learned trial judge was right in giving judgment for the respondent.

Cases referred to:-

(1) *Bonnington Castings Ltd.* v. *Wardlaw* [1955] 1 All E.R. 615; [1956] A.C. 613.

(2) *Speed* v. *Thomas Swift Company Ltd.* [1943] K.B. 557, 563.

(3) *Colfar* v. *Coggins & Griffith (Liverpool) Ltd.* [1945] A.C. 197, 202.

(4) *Winter* v. *Cardiff Rural District Council* [1950] 1 All E.R. 819.

(5) *General Cleaning Contractors Ltd.* v. *Christmas* [1953] A.C. 180 at p. 195.

(6) *Morris* v. *W. Hartlepool Navigation Co. Ltd.* [1956] 1 All E.R. 385 at p. 387.

(7) *Paris* v. *Stepney Borough Council* [1951] 1 All E.R. 49.

(8) *Cavanagh* v. *Ulster Weaving Co.* [1960] A.C. 145.

(9) *Graham* v. *Co-operative Wholesale Society Ltd.* [1957] 1 All E.R. 654 at p. 656.

(10) *Morton* v. *William Dixon Ltd.* [1909] S.C. 807, 809.

(11) *Walker* v. *Bowaters Mersey Paper Mills Ltd.* [1952] 2 Ll. Rep. 299 at p. 301.

(12) *Stapley* v. *Gypsum Mines Ltd.* [1953] A.C. 663.

(13) *Kelly* v. *Manchester Ship Canal Company* [1966] 1 Ll. Rep. 254.

(14) *Martin* v. *A.B. Dalzell & Co. Ltd.* [1956] 1 Ll. Rep. 94.

(15) *Tan Choon Seng* v. *Yang Kam Hah* [1970] 1 M.L.J. 175.

(16) *Hamid bin Awang* v. *Yeo Kim Kuan* [1966] 1 M.L.J. 124.

(17) *Barkway* v. *South Wales Transport* [1950] 1 All E.R. 392 at p. 402.